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# Danger at the Intersection of Second and Fourth

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# DANGER AT THE INTERSECTION OF SECOND AND FOURTH

J. RICHARD BROUGHTON\*

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## I. INTRODUCTION

Perhaps no one on the current Supreme Court has been more adamant about protecting firearm possession rights than Justice Thomas. Take, for example, his dissent in *Whole Woman's Health v. Hellerstedt*, which on its face was a case about the constitutionality of a Texas law that created multiple restrictions on a woman's ability to procure an abortion in the state.<sup>1</sup> The Supreme Court invalidated both restrictions at issue.<sup>2</sup> Justice Thomas's dissent, however, saw a much deeper problem in the Court's constitutional rights jurisprudence, one that went beyond abortion rights. His position with respect to the constitutional right to an abortion already well-established, Thomas lamented that "[t]he Court has simultaneously transformed judicially created rights like the right to an abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution."<sup>3</sup> "But," he continued, "our Constitution renounces the notion that some constitutional rights are more equal than others."<sup>4</sup>

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1. 136 S. Ct. 2292 (2016).

2. *Id.*

3. *Id.* at 2329 (Thomas, J., dissenting).

4. *Id.*

To which enumerated rights could Justice Thomas have been referring? Which enumerated rights have been disfavored? He appeared to give a more specific answer in a different case, on the very same day. In *Voisine v. United States*, the Supreme Court held that a reckless domestic assault is a “misdemeanor crime of domestic violence” for purposes of the gun possession restrictions contained in 18 U.S.C. § 922(g)(9).<sup>5</sup> Justice Thomas wrote a dissenting opinion expressing concern that the Court’s interpretation would sweep the statute into “patently unconstitutional territory” pursuant to the Second Amendment.<sup>6</sup> Troubled by the Court’s failure to appreciate the significance of Second Amendment rights, Thomas wrote, “[w]e treat no other constitutional right so cavalierly.”<sup>7</sup> Noting that the Government could not identify any other constitutional right that could be forever lost by a single criminal conviction, and asserting that the Court would never uphold a lifetime ban on publishing by a person who had a previous conviction for misdemeanor libel, Thomas concluded that “the Court continues to ‘relegat[e] the Second Amendment to a second-class right.’”<sup>8</sup>

Some of Justice Thomas’s colleagues in the federal judiciary may be (slowly) coming around to his view. In 2008, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment protects an individual right to keep and bear arms in the home for purposes of confrontational defense.<sup>9</sup> Although lower federal courts have fairly consistently rejected various Second Amendment challenges to federal and state gun restrictions,<sup>10</sup> a few recent cases suggest that Second Amendment claims, and gun rights more generally, may be gaining traction.<sup>11</sup> Much of the lower court Second Amendment litigation often turns on application of the standard of review<sup>12</sup>—a subject with which the Supreme Court did not engage much in *Heller*<sup>13</sup>—but there are new signs that federal courts are taking gun rights seriously.<sup>14</sup>

Moreover, many American jurisdictions have moved, particularly in the last decade, toward substantially more liberal gun possession legislation. Even in the

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5. 136 S. Ct. 2272 (2016).

6. *Id.* at 2291 (Thomas, J., dissenting). Justice Sotomayor joined Parts I and II of the Thomas dissent, but did not join in Thomas’s language with respect to the Second Amendment.

7. *Id.*

8. *Id.* at 2292 (quoting *Friedman v. Highland Park*, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of certiorari)). See also *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari) (repeating criticisms of the federal judiciary’s treatment of Second Amendment rights, and stating “[t]he Second Amendment is a disfavored right in this Court.”).

9. 554 U.S. 570 (2008).

10. See generally J. Richard Broughton, *The Ineludible (Constitutional) Politics of Guns*, 46 CONN. L. REV. 1345 (2014) (discussing federal court litigation concerning federal firearms restrictions). Cf. Glenn Harlan Reynolds, *Second Amendment Limitations*, 14 GEO. J. L. & PUB. POL’Y 233, 243 (2016) (evaluating a few cases and noting that while many federal courts are “under-reading” *Heller* to limit firearms rights, “not all federal courts are as hostile to Second Amendment rights.”).

11. See generally Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 18–21 (2015). See *infra* Section IV.B.

12. See, e.g., *United States v. Marzarella*, 614 F.3d 85, 95 (3rd Cir. 2010). For a pre-*Heller* view of how to apply levels of scrutiny to gun restrictions, see Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683 (2007).

13. See *Heller*, 554 U.S. at 628 n.27.

14. See *infra* Part III.

wake of repeated mass shootings, state legislatures have enacted numerous new laws to protect gun ownership and possession—from more liberal open carry laws to permissible carry in government buildings and on college campuses.<sup>15</sup> States like Idaho, for example, have among the most permissive gun laws in the Nation: Idaho allows open carry of both handguns and long guns;<sup>16</sup> prohibits (by state constitutional provision) licensure or registration of firearms;<sup>17</sup> allows open carry in restaurants that serve alcohol; and carry of a concealed loaded handgun in public without a permit.<sup>18</sup> Of course, recent high-profile gun crimes may lead liberal gun-rights jurisdictions to reevaluate their policies and tighten some restrictions, but for now, many states will have generally permissive gun laws.

The liberalization of gun rights, however, has created some conflict with criminal law enforcement. It raises new questions about the ability of law enforcement officers to protect their own, and the public's, safety, and to determine which gun owners pose a threat of danger to the community.<sup>19</sup> Whether a particular form of gun possession renders the possessor dangerous, then, lends special significance to a line of cases that have received insufficient attention, and that implicate the intersection of American gun law and constitutional criminal procedure rights under the Fourth Amendment. As one federal judge has said, "After *Heller* and *McDonald*, all of us involved in law enforcement, including judges, prosecutors, defense attorneys, and police officers, will need to reevaluate our thinking about these Fourth Amendment issues and how private possession of firearms figures into our thinking."<sup>20</sup>

In the landmark *Terry v. Ohio* decision, the Supreme Court rejected the notion that all police encounters that implicate the Fourth Amendment must be justified by the standard of probable cause.<sup>21</sup> Rather, for brief investigative detentions, it is sufficient if the officer has reasonable suspicion that a crime is being or has been

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15. See Associated Press, *States Expanded Gun Rights After Sandy Hook School Massacre*, NBC NEWS (Dec. 13, 2015), <https://www.nbcnews.com/news/us-news/states-expanded-gun-rights-after-sandy-hook-school-massacre-n479216>; Reid Wilson, *Iowa Governor Signs Sweeping Expansion of Gun Rights*, HILL (Apr. 13, 2017), <http://thehill.com/homenews/state-watch/328712-iowa-governor-signs-sweeping-expansion-of-gun-rights>; Lynn Hulsey, *Ohio Gun Law that Takes Effect Today Continues State Loosening of Gun Restrictions*, DAYTON DAILY NEWS (Mar. 21, 2017), <http://www.daytondailynews.com/news/crime-law/ohio-gun-law-that-takes-effect-today-continues-state-loosening-gun-restrictions/3czJ3tOwVUNKzmEqbwPz1N/>; Associated Press, *State Laws Expand Concealed Gun Rights to College Campuses, Public Facilities*, FOX NEWS (July 2, 2017), <http://www.foxnews.com/us/2017/07/02/state-laws-expand-concealed-gun-rights-to-college-campuses-public-facilities.html>.

16. See IDAHO CODE ANN. § 18-3302(4) (West 2016).

17. IDAHO CONST. art. I, § 11.

18. See IDAHO CODE ANN. § 18-3302(3) (West 2016).

19. See Campbell Robertson & Timothy Williams, *As States Expand Gun Rights, the Police Object*, N.Y. TIMES (May 3, 2016), <https://www.nytimes.com/2016/05/04/us/as-states-expand-gun-rights-police-join-opposition.html>. For recent commentary on the inherent dangerousness of guns as it relates to *Terry*, see Nadia Maraachli, *The Fourth Amendment Shall Prevail, Come Heller High Water*, 94 U. DET. MERCY L. REV. 75 (2017); Matthew J. Wilkins, *Armed and Not Dangerous? A Mistaken Treatment of Firearms in Terry Analyses*, 95 TEX. L. REV. 1165 (2017).

20. *United States v. Williams*, 731 F.3d 678, 694 (7th Cir. 2013) (Hamilton, J., concurring in part and concurring in judgment). See also Bellin, *supra* note 11, at 4 ("dramatic changes in the nation's substantive gun laws erode the constitutional underpinnings of urban gun policing.").

21. 392 U.S. 1 (1968).

committed.<sup>22</sup> But the Court went even further, allowing officers not merely to detain and question a suspect on reasonable suspicion, but also to conduct a pat down of the suspect's outer clothing for weapons.<sup>23</sup> Such a frisk, however, is justified only when the officer has additional reasonable suspicion that the suspect is "armed and presently dangerous."<sup>24</sup>

In a nation of liberalized gun laws, however, *Terry's* standard for frisking a suspect raises a problem: Is a person who is armed necessarily dangerous? Can one possess a firearm and yet not be subjected to a frisk because he is not, or cannot reasonably be suspected as, "presently" dangerous? This problem places American law squarely at the intersection of gun rights and Fourth Amendment rights. This Paper therefore explores that intersection and evaluates the various approaches to resolving this question about the scope of *Terry*.

## II. *TERRY* FRISKS IN THE SUPREME COURT

The intersection of *Terry* doctrine and gun rights makes particular sense: *Terry* was actually a gun case. Recall that although Officer Martin McFadden suspected John W. Terry and his cohorts (Chilton and Katz) of casing the store on Huron Road in Cleveland for a Halloween robbery, his inclination to frisk them was based on his suspicion that the men were armed with guns.<sup>25</sup> As it turned out, Terry and Chilton both had revolvers in their coats.<sup>26</sup> Terry was charged not with robbery, or conspiracy, or attempt, but with carrying a concealed weapon.<sup>27</sup> In determining whether possession of a firearm by itself is sufficient for a frisk (rather than for the stop), then, some attention must be given to the Court's specific language.

Chief Justice Warren's opinion for the Court acknowledged that the "crux of [the] case" was not whether it was proper for Officer McFadden to investigate the suspicious behavior of Terry and his cohorts, but, rather, whether it was permissible to frisk them for weapons.<sup>28</sup> The Court referred to the "more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."<sup>29</sup> It also noted that it would be "unreasonable to require that police officers take unnecessary risks in the performance of their duties."<sup>30</sup> Consequently, when an officer is "justified" in believing that the suspect is "armed and presently

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22. *Id.* at 30. "Reasonable suspicion" is not an utterance formally found in *Terry*, but *Terry* permitted a brief investigative detention on less than probable cause and said the officer need only act "reasonably." *Id.* Therefore, subsequent cases have read *Terry's* standard this way. See *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (summarizing the standard for a *Terry* stop). See also Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 951–52 (1998) (summarizing the rule from *Terry*, as developed through subsequent cases).

23. *Terry*, 392 U.S. at 30.

24. *Id.*

25. *Id.* at 5–6. For an interesting perspective on Officer McFadden and the circumstances of the initial stop, see Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727 (1998).

26. *Terry*, 392 U.S. at 7.

27. *Id.* at 4.

28. *Id.* at 23.

29. *Id.*

30. *Id.*

dangerous to the officer or to others,” it is reasonable to permit the officer to frisk the suspect’s outer clothing for weapons.<sup>31</sup>

And yet *Terry* was careful to balance this interest against the personal security and rights of the suspect. A pat-down is a “severe, though brief intrusion upon” the security of the individual.<sup>32</sup> And while the Court rejected *Terry*’s contention that such a pat-down ought to be permissible only as incident to arrest and upon probable cause, it was careful to place limits on the officer’s ability to conduct the frisk.<sup>33</sup> The officer’s judgment may not be based on inarticulate hunches, but rather must be based on “specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”<sup>34</sup> The Court further explained that the frisk must occur in the course of the investigation of the suspect’s behavior and where the officer has identified himself and made “reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety[.]”<sup>35</sup> The frisk is not a search for criminal evidence and must end once the suspect has been disarmed or the officer learns that the suspect was unarmed.<sup>36</sup>

*Terry*, then, while accounting for the Fourth Amendment rights of criminal suspects, looks very different from the less law-enforcement-friendly decisions for which the Warren Court was, to its critics, notorious.<sup>37</sup> Moreover, the background of the *Terry* opinion and its author offers a window into *Terry*’s focus on officer safety. The son of a father who was murdered,<sup>38</sup> Warren spent over two decades in law enforcement, as a deputy district attorney, district attorney, and Attorney General of California.<sup>39</sup> Although his professional experience did not always lead him to side with the government in criminal cases, as Yale Kamisar writes, “[o]f all the opinions Warren wrote in his decade and a half on the Court, his opinion in *Terry* best demonstrates his kinship with the police and his concern for their safety.”<sup>40</sup> And as

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31. *Id.* at 24.

32. *Terry*, 392 U.S. at 24–25.

33. *Id.* at 26.

34. *Id.* at 27.

35. *Id.* at 30.

36. *Id.* The Court had occasion to apply this standard the same day that it decided *Terry*. In *Sibron v. New York*, an officer had observed the suspect meeting over the course of several hours with known drug users. 392 U.S. 40, 45 (1968). The officer had no information about *Sibron* or his activities. *Id.* When the officer approached *Sibron* outside of a restaurant where he had been seen with three known drug users, the officer said to *Sibron*, “you know what I am after.” *Id.* *Sibron* reached into his pocket, at which point the officer also reached into the same pocket and found heroin. *Id.* The Court held that the frisk of *Sibron* was unconstitutional under *Terry* because the officer had no reasonable suspicion that *Sibron* was even armed, much less armed and dangerous. *Id.* at 64. Rather, it was clear to the Court that the officer was searching for drugs, as the officer had not indicated any fear about *Sibron* possessing a weapon. *Id.*

37. See, e.g., KENNETH W. STARR, *FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE* 176–90 (2002) (criticizing Warren Court criminal procedure rulings); cf. Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337 (2002) (discussing Rehnquist Court roll-backs of Warren Court criminal procedure doctrine).

38. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT: A JUDICIAL BIOGRAPHY* 11–12 (1983).

39. Yale Kamisar, *How Earl Warren’s Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 12 (2005).

40. *Id.* at 31. See also Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective*, 72 ST. JOHN’S L. REV. 891, 903 (1998) (stating “my experience with Chief

Ed Cray writes in his biography of Chief Justice Warren, although there were concerns on the Court about granting police a “hunting license” in *Terry*, Warren nevertheless “would find the necessary justification not in the behavior of the suspect but in the realities of police work.”<sup>41</sup> Those realities were laid bare for the Court, and the country, when one considers the turbulent and violent months that preceded the *Terry* opinion.<sup>42</sup> *Terry* was handed down on June 10, 1968. By that time, Americans had witnessed their share of violence: the assassination of Martin Luther King Jr. happened in April, and violence had erupted in the streets of Chicago (even before the Democratic Convention later that summer) and earlier in Detroit and Newark.<sup>43</sup> Five days before *Terry* was delivered, Senator Robert F. Kennedy was assassinated in a packed hotel ballroom in California while campaigning for President.<sup>44</sup> In light of the public violence that Americans had experienced in recent months, as well as the statistics on the killing of police officers in the performance of their duties that the Chief Justice’s opinion cited<sup>45</sup>—and understanding the criticisms that the Warren Court had sustained as being unfriendly to law enforcement<sup>46</sup>—it is unsurprising that the Court would craft an opinion protective of police officers in dealing with armed suspects.

Since 1968, though, the Court has seldom grappled with questions about the propriety of a frisk of the suspect. In *Terry*, the Court did not clearly describe the legal standard for the frisk (nor, for that matter, for the stop), other than that it must be justified by reasonable belief that the suspect is presently armed and dangerous. It was in subsequent cases that the reasonable suspicion standard evolved.<sup>47</sup> Consider, too, Justice Harlan’s important *Terry* concurrence. He argued that the authority to conduct a frisk should be “immediate and automatic” where the suspect is stopped for a violent crime,<sup>48</sup> though he further clarified that position

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Justice Warren convinced me that he was, above all, an enormously practical man, well-schooled in the craft of government, and best schooled in the practice of law enforcement, which was his field for the majority of his career.”).

41. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 467 (1997).

42. See Kamisar, *supra* note 39, at 31–32 (Kamisar agrees with Francis Allen’s observations that the “period was a time of social upheaval, violence in the ghettos, and disorder on campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order was politically exploited.”); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539 (1975). Allen concluded, “[t]hese events combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court’s mission in criminal cases.” *Id.*

43. For a description of this and other violence in the late 1960s, and its impact on American politics, see MICHAEL A. COHEN, *AMERICAN MAELSTROM: THE 1968 ELECTION AND THE POLITICS OF DIVISION* 28 (2016). See also LAWRENCE O’DONNELL, *PLAYING WITH FIRE: THE 1968 ELECTION AND THE TRANSFORMATION OF AMERICAN POLITICS* 381, 416 (2017). O’Donnell writes, “This was the summer of 1968—the summer of riots and assassinations.” *Id.* at 435.

44. O’DONNELL, *supra* note 43, at 425–26 (describing Kennedy’s assassination).

45. See *Terry v. Ohio*, 392 U.S. 1, 24 n.21.

46. See Kamisar, *supra* note 39, at 11.

47. See Saltzburg, *supra* note 22, at 962–63 (discussing cases that developed reasonable suspicion standard).

48. See *Terry*, 392 U.S. at 33 (Harlan, J., concurring).

in his *Sibron* concurrence.<sup>49</sup> Where the Court has dealt with the frisk, however, it has cast some doubt on the idea that an officer must make inquiries before conducting a frisk based on reasonable suspicion, as well as on the idea that the mere legality of gun possession is sufficient to preclude the frisk.

*Adams v. Williams* is a significant frisk case<sup>50</sup>—perhaps as important as *Terry*—and yet it involved the seizure of a weapon by something other than a traditional pat-down pursuant to a stop. A Bridgeport, Connecticut, police officer received a tip from a known informant that Williams was in his car with a handgun and narcotics.<sup>51</sup> Rather than opening the door as the officer had requested, Williams lowered the car window, at which point the officer reached into the car and pulled a loaded revolver from Williams's waistband.<sup>52</sup> The officer could not initially see the firearm from outside the vehicle, but it was where the informant said it would be.<sup>53</sup> A subsequent search of the car revealed heroin, a machete, and another revolver.<sup>54</sup>

Upholding the seizure of the gun, the Court reiterated that the purpose of the *Terry* frisk is not to uncover evidence of a crime but to “allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.”<sup>55</sup> As long as the officer has “reason to believe that the suspect is armed and dangerous,” the officer may conduct a limited frisk for weapons.<sup>56</sup> Here, the officer had “ample reason to fear for his safety” because Williams did not comply with the request to open the door, thus making it reasonable for the officer to reach for the place where the informant had said that the gun would be.<sup>57</sup> The Court also dropped a footnote supplying statistics on police officer shootings. “According to one study,” the Court said, “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.”<sup>58</sup>

And in *Pennsylvania v. Mimms*, the Court upheld a frisk where a driver had been asked to exit his car and the officer noticed a bulge in the driver's jacket.<sup>59</sup> Philadelphia police stopped Mimms for driving on an expired license plate.<sup>60</sup> When Mimms exited, one of the officers noticed the bulge and immediately conducted a

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49. See *Sibron v. New York*, 392 U.S. 40, 74 (1968). (Harlan, J., concurring). Harlan said that “[i]f the nature of the suspected offense creates no reasonable apprehension for the officer's safety, I would not permit him to frisk unless other circumstances did so.” *Id.*

50. *Adams v. Williams*, 407 U.S. 143 (1972). Saltzburg argues that Justice Harlan's concurrence became “the legacy of *Terry*” after *Williams*. Saltzburg, *supra* note 22, at 944.

51. *Williams*, 407 U.S. at 144–45.

52. *Id.* at 145.

53. *Id.*

54. *Id.*

55. *Id.* at 146.

56. *Id.*

57. *Williams*, 407 U.S. at 147–48.

58. *Id.* at 148 n.3.

59. 434 U.S. 106, 107 (1977).

60. *Id.*



frisk.<sup>61</sup> The frisk uncovered a firearm with five live rounds.<sup>62</sup> *Mimms* was prosecuted for carrying an unlicensed firearm and a concealed deadly weapon.<sup>63</sup>

Even though the police had no reason to suspect *Mimms* of committing a violent crime, the Court found the frisk reasonable.<sup>64</sup> Once the officer noticed the bulge in *Mimms*'s jacket, the officer was permitted to conclude that "*Mimms* was armed and *thus posed* a serious and present danger to the safety of the officer. In these circumstances, any man of 'reasonable caution' would have conducted the 'pat down.'"<sup>65</sup>

After *Williams* and *Mimms*, then, it appears as though the Court does not require any meaningful inquiry prior to a frisk, so long as the officer has an objectively reasonable basis for conducting the frisk in the absence of an inquiry. This information can come from an informant's tip, as in *Williams*, or from the officer's personal observation of the suspect, as in *Mimms*. In neither case did the Court require that the officer ask questions to gain specific information about the threat that the suspect may pose. Nor did the Court require inquiry into the legality of the suspect's weapons possession. And language from both *Williams* and *Mimms* suggests that in each case the weapons possession was by itself sufficient to justify a frisk.<sup>66</sup> Perhaps these cases implicitly tell us how police must treat a suspect who they suspect to be armed but for whom no additional evidence of dangerousness is then known to the investigating officer. Yet, they were all decided before the development of modern Second Amendment case law and the contemporary expansion of state-law gun rights. Does that matter?

### III. FIREARMS AND *TERRY* IN THE LOWER FEDERAL COURTS

It is perfectly lawful to carry any number of items that could also be used as weapons against an officer or others—baseball bats, scissors, fountain pens, letter openers. But firearms, unlike these other items, are specifically designed for killing or injuring; they have no other function. To be sure, one may merely collect firearms, but collectors do not typically carry their collections in public, in their waistbands or a holster. Moreover, one may carry his firearm on a daily stroll or to the firing range to practice shooting, without any specific desire to use the weapon against someone. But arguably the reason he possesses the gun in the first place is to make himself dangerous to others, even if lawfully so, in the case of confrontation. The dangers created by firearm possession may even arguably be heightened in police encounters, where nervousness and tension can affect rational thought. In those situations, one may credibly argue, it is not unreasonable for an officer to believe that the mere possession of the firearm makes the suspect dangerous, even if the suspect otherwise poses—and intends to pose—no threat to anyone. The officer often cannot readily know the suspect's intentions. Of course, baseball bats, scissors, and letter openers are not the subject of specific constitutional protec-

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 112.

65. *Mimms*, 434 U.S. at 112 (emphasis added).

66. See *Williams*, 407 U.S. at 147–48; *Mimms*, 434 U.S. at 112.

tions. And the kind of protections given to firearms in the Second Amendment extends even more broadly when one considers some state law. So, in a jurisdiction with liberalized laws about public carrying of firearms, two questions arise: first, is a *Terry* stop permissible merely on the basis of gun possession? And second, assuming a legitimate basis for a stop, is it reasonable for a police officer to believe that suspect is dangerous because he is armed with a gun? The cases in this section explore those distinct questions, though this article's primary focus is on the latter.

#### A. The Significance of *United States v. Robinson*

The Fourth Circuit's recent *en banc* decision in *United States v. Robinson* addresses this dilemma involving *Terry* frisks of suspected gun possessors after a lawful stop in a liberal gun rights jurisdiction.<sup>67</sup> Local police in Ranson, West Virginia, received an anonymous tip from an eyewitness that a "black [man] in a blueish greenish Toyota Camry" had just loaded a gun and "conceal[ed] it in his pocket[.]"<sup>68</sup> This incident occurred in the parking lot of a Ranson 7-Eleven, a high-crime area known for drug transactions.<sup>69</sup> The tip was relayed to two officers who responded to the call.<sup>70</sup> Officer Kendall Hudson soon observed the Camry.<sup>71</sup> A white woman drove, with a black male passenger.<sup>72</sup> Officer Hudson stopped the vehicle for a seat-belt violation.<sup>73</sup> After asking for identification, and concerned that Robinson might be armed, Officer Hudson asked Robinson to exit the vehicle.<sup>74</sup> Police Captain Robbie Roberts then arrived and asked Robinson if he had weapons.<sup>75</sup> Without responding, Robinson gave the captain "a weird look."<sup>76</sup> At that point, Captain Roberts performed a frisk of Robinson's person and recovered a loaded handgun from Robinson's front pants pocket.<sup>77</sup>

Captain Roberts recognized that Robinson was a convicted felon, and Robinson was arrested.<sup>78</sup> He was eventually prosecuted by the United States pursuant to the federal felon-in-possession statute<sup>79</sup> and entered a conditional guilty plea after the district court denied his motion to suppress the gun.<sup>80</sup> After initial reversal on appeal, the *en banc* Fourth Circuit affirmed the denial of the motion to suppress.<sup>81</sup>

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67. 846 F.3d 694 (4th Cir. 2017) (*en banc*).

68. *Id.* at 696.

69. *Id.*

70. *Id.*

71. *Id.* at 697.

72. *Id.*

73. *Robinson*, 846 F.3d at 697.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Robinson*, 846 F.3d at 697. "Robinson was charged with the illegal possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1)" *Id.*

80. *Id.*

81. *Id.* at 696–97. The previous opinion was *United States v. Robinson*, 814 F.3d 201 (4th Cir. 2016).

Robinson argued that even if the officers had reasonable suspicion that he was armed, they lacked reasonable suspicion that he was dangerous.<sup>82</sup> According to Robinson, because West Virginia law permitted concealed carry of a licensed gun, and because the officers could not have known at the time whether Robinson's gun was licensed, they had no Fourth Amendment justification for the conclusion that he was presently dangerous.<sup>83</sup>

Rejecting Robinson's contention, Judge Niemeyer's opinion for the *en banc* majority focused on two notions: first, that there are inherent dangers in certain police stops, including traffic stops, and that the danger to officers inherent in those stops is magnified when the suspect is armed;<sup>84</sup> and second, that the suspect's dangerousness does not dissipate merely because the suspect possesses a weapon lawfully.<sup>85</sup> Connecting the risks inherent in *Terry* stops to the standard for justifying a *Terry* frisk, the court cited *Terry* when saying, "when the officer reasonably suspects that the person he has stopped is armed, the officer 'is warranted in the belief that his safety . . . [is] in danger[.]'"<sup>86</sup>

Note the categorical manner in which the Fourth Circuit phrases its legal conclusion. The court does not say that the officer "may be" warranted in the belief that he is in danger; rather, the officer "is" warranted in such belief.<sup>87</sup> Relying on both *Terry* and *Mimms*, the court said that the Fourth Amendment requires only a lawful stop under *Terry* and reasonable suspicion that the suspect is "armed and therefore dangerous[.]"<sup>88</sup> concluding that *Terry* and *Mimms* had "deliberately linked 'armed' and 'dangerous[.]'"<sup>89</sup> In other words, once the officer possesses reasonable suspicion that the suspect is armed (as was true with Robinson) there is no need for a distinct inquiry into the suspect's dangerousness. The suspect is automatically dangerous if he is armed. Effectively, "dangerous" is rendered superfluous once "armed" is established.

Moreover, it does not matter that the underlying gun possession is lawful. Although Robinson noted that, in *Mimms*, Pennsylvania law made the concealed carry illegal, whereas West Virginia law permitted concealed carry of a licensed gun, the court found that *Williams* makes clear that the distinction is irrelevant.<sup>90</sup> The purpose of the *Terry* frisk, *Williams* said, "is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law."<sup>91</sup> Even without the aid of the language from *Williams*, the Fourth Circuit said the presumptive lawfulness

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82. *Robinson*, 846 F.3d at 698.

83. *Id.*; See also W. VA. CODE §§ 61-7-3, -4 (West 2018) (making it a misdemeanor to carry a concealed weapon without a license and setting forth procedures for obtaining a license).

84. *Robinson*, 846 F.3d at 698-99.

85. *Id.* at 700-01.

86. *Id.* at 699 (quoting *Terry v. Ohio*, 392 U.S.1, 27 (1968)).

87. *Robinson*, 846 F.3d at 699.

88. *Id.* at 700.

89. *Id.*

90. *Robinson*, 846 F.3d at 701.

91. *Id.* (emphasis removed) (quoting *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

of weapons possession tells us nothing about whether the officer's concern for his safety is reasonable.<sup>92</sup>

Now compare the majority's categorical (or *per se*) approach in *Robinson* with the views of the *Robinson* separate opinions.

First, it is fair to ask: would the majority's conclusion about inherent dangerousness be different if the suspected weapon was not a gun? Judge Wynn implicitly raises this question in his *Robinson* concurrence.<sup>93</sup> He asks whether, using the categorical approach to dangerousness, a person suspected of carrying a wine bottle could automatically be frisked, because a wine bottle can be dangerous.<sup>94</sup> The only way to reconcile the majority's "absurd" approach to the frisk analysis is to concede that firearms are unique.<sup>95</sup> Once one makes such a concession—which Judge Wynn justifies by examining both case law and public policy related to firearms as inherently dangerous items—one must confront the claim that the frisk analysis, if unique to firearms, imposes a burden on gun owners that it does not impose on others who possess items that may be dangerous to officers but are simply not guns.<sup>96</sup> Judge Wynn's approach is that "individuals who carry firearms elect to subject themselves to being frisked when lawfully stopped by law enforcement officers."<sup>97</sup> This, he argues, is consistent with the conclusion that other provisions of the Constitution—including the Second Amendment itself, the First Amendment, and the Fourth Amendment—all impose burdens on gun possessors because of the risks posed to law enforcement and third parties.<sup>98</sup>

Judge Harris's *Robinson* dissent is distinctly protective of contemporary gun rights. Not only does she reject a categorical approach, particularly one aimed at guns, she also concludes that the proper Fourth Amendment approach is one that engages in an independent inquiry into whether the suspect—even one carrying a gun—is dangerous.<sup>99</sup> While she acknowledges that in past years public carrying might have given rise to the conclusion that the carrier was a dangerous law-breaker, modern firearms law has granted substantially more legal protection to citizens as gun owners.<sup>100</sup> Accordingly, "we no longer may take for granted the same correlation between 'armed' and 'dangerous.' . . . I cannot endorse a rule that puts us on a collision course with rights to gun possession rooted in the Second Amendment and conferred by state legislatures."<sup>101</sup>

The dissent makes the point that this changing legal landscape alters *Terry*'s application. Although she acknowledges that guns are "in some sense intrinsically dangerous[.]"<sup>102</sup> once the legislature has seen fit to grant citizens the legal right to publicly carry firearms, a court cannot fairly conclude that each and every citizen

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92. *Robinson*, 846 F.3d at 701. See also Wilkins, *supra* note 19, at 1175 (noting that the *Robinson en banc* majority did not cite *Heller*).

93. *Robinson*, 846 F.3d at 704–05 (Wynn, J., concurring).

94. *Id.* at 704.

95. *Id.*

96. *Id.*

97. *Id.* at 706.

98. *Id.*

99. *Robinson*, 846 F.3d at 707 (Harris, J., dissenting).

100. *Id.*

101. *Id.*

102. *Id.* at 708.

carrying a firearm is necessarily dangerous.<sup>103</sup> Doing so would undermine the very judgment of the legislative body that granted the right to carry in the first place.<sup>104</sup> According to the dissent's reasoning, then, once the legislature concludes that public carrying of firearms is legally permissible, it is constitutionally unreasonable to conclude that the person possessing the firearm is necessarily dangerous, in the absence of some other factor or factors that would independently produce a finding of dangerousness. The dissent, therefore, would treat the legal status of public carry as a significant factor in the analysis, and require an independent determination of dangerousness, thus avoiding the *Williams* problem that the majority identifies. *Williams*, the dissent says, states only that a "lawfully possessed firearm *can* pose a threat to officer safety[.]" not that it necessarily does.<sup>105</sup>

Three distinct approaches emerge from *Robinson*. First, the categorical approach of Judge Niemeyer's majority opinion, in which reasonable suspicion that a suspect is armed is *per se* sufficient to conclude that the suspect is dangerous and to conduct a frisk.<sup>106</sup> Second, the modified categorical approach—or, perhaps more precisely, the firearms-only categorical approach—of Judge Wynn, in which reasonable suspicion that a suspect is armed with a weapon is sufficient to conclude that the suspect is dangerous and to conduct a frisk *if the suspected weapon is a firearm*.<sup>107</sup> And third, the independent dangerousness approach, which treats the suspect's dangerousness as a separate and distinct inquiry, and permits a frisk only if the suspect is deemed to be dangerous based on factors other than *mere* weapons possession.<sup>108</sup>

#### B. Terry Cases Accounting for Constitutional and State Law Gun Rights

Other lower court decisions, on their face, suggest that *Robinson's* holding is an outlier. This reading of the case law may, however, prove deceptive. Nonetheless, a number of other cases have been far more protective of legislative judgments about the trust placed in citizens to carry guns in public. In this sense, they lend credibility to the independent dangerousness approach, even if those cases—as I explain here—address slightly different problems than the problem that *Robinson* addressed.

Judge Harris's *Robinson* dissent cites *United States v. Black*, a Fourth Circuit case that produced a holding consistent with the independent dangerousness approach (it was not cited by the *Robinson* majority).<sup>109</sup> Black was arrested after being seen with a group of other men in the parking lot of an apartment complex in a high-crime area of Charlotte, North Carolina.<sup>110</sup> Police had followed one of the other

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103. *Id.*

104. *Id.* at 708–09.

105. *Robinson*, 846 F.3d at 710. *But cf.* Wilkins, *supra* note 19, at 177 (explaining post-Terry cases suggesting there is no distinction between being armed and being dangerous).

106. *Robinson*, 846 F.3d at 695–702 (majority opinion).

107. *Id.* at 702–07 (Wynn, J., concurring).

108. *Id.* at 707–16 (Harris, J., dissenting).

109. 707 F.3d 531 (4th Cir. 2013).

110. *Id.* at 534–35.

men—Troupe—after suspecting him of engaging in a drug transaction.<sup>111</sup> When police approached the group of men, Troupe raised his hands and indicated to officers that he had a holstered gun.<sup>112</sup> Troupe’s gun was seized.<sup>113</sup> Police eventually focused attention on Black, who began to leave and was told he could not.<sup>114</sup> He then fled, was chased, and tackled.<sup>115</sup> A frisk uncovered a firearm and Black was indicted pursuant to the federal felon-in-possession statute.<sup>116</sup>

The Fourth Circuit held that police lacked reasonable suspicion to stop Black.<sup>117</sup> Rejecting the Government’s claim that Troupe’s firearm possession could serve as a factor in the development of reasonable suspicion, the court noted the legality of open carry in North Carolina.<sup>118</sup> The panel stated that “where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states.”<sup>119</sup> Consequently, the police could not justify Troupe’s detention and, as a result, could not use that detention as a basis for detaining Black.<sup>120</sup>

Similarly, in *Northrup v. City of Toledo Police Department*,<sup>121</sup> the Sixth Circuit emphatically distinguished between being merely armed, on the one hand, and being armed *and dangerous*, on the other.<sup>122</sup> Northrup went for a walk with his wife, daughter, grandson, dog, and a semiautomatic handgun visibly placed on his hip.<sup>123</sup> His wife, Denise, exchanged unpleasant words with a passerby, Rose, who complained to Northrup: “[y]ou can’t walk around with a gun like that!”<sup>124</sup> Rose called 911 to report Northrup’s open carry.<sup>125</sup> Despite acknowledging that Ohio law permitted open carry with a concealed-carry weapon permit (CCW), and despite Rose expressing no desire to call for a police response if Northrup’s carry was legal, the dispatcher nonetheless called for an officer.<sup>126</sup> When Officer David Bright arrived and spotted Northrup, he seized the firearm and asked for both a driver’s license and CCW from Northrup, who provided the driver’s license.<sup>127</sup> Denise then told Officer Bright to research the CCW himself, at which point Bright arrested Northrup for “inducing panic.”<sup>128</sup> After Officer Bright confirmed Northrup’s CCW, and after another officer arrived on the scene, he released Northrup with a citation for failing

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111. *Id.* at 534.

112. *Id.* at 535.

113. *Id.*

114. *Id.* at 536.

115. *Black*, 707 F.3d at 536.

116. *Id.*

117. *Id.* at 539.

118. *Id.* at 540. *See also* N.C. GEN. STAT. §§ 14-415.10 to .23 (West 2018) (describing procedures for obtaining concealed carry permit and permit carry of handgun with permit).

119. *Black*, 707 F.3d at 540.

120. *Id.*

121. 785 F.3d 1128 (6th Cir. 2015).

122. *Id.* at 1132.

123. *Id.* at 1129–30.

124. *Id.* at 1130.

125. *Id.*

126. *Id.*

127. *Northrup*, 785 F.3d at 1130.

128. *Id.*

to disclose personal information.<sup>129</sup> The state dropped that charge and Northrup filed a civil suit against the police department and the two officers.<sup>130</sup>

Although the second officer enjoyed qualified immunity, Officer Bright did not.<sup>131</sup> The requirement of establishing that a suspect is both armed and dangerous, “and the impropriety of Officer Bright’s demands are particularly acute in a state like Ohio[,]” Judge Sutton’s opinion for the court said.<sup>132</sup> “Not only has the State made open carry of a firearm legal, but it also does not require gun owners to produce or even carry their licenses for inquiring officers.”<sup>133</sup>

Judge Sutton’s opinion also rejected the various proposed justifications for the stop of Northrup, including Officer Bright’s contention that if he had not conducted an investigatory stop of Northrup, there remained the possibility that Northrup could begin shooting and endanger the public.<sup>134</sup> According to the opinion, Officer Bright could have engaged in a consensual encounter with Northrup to make an initial determination of his dangerousness.<sup>135</sup> But absent reasonable suspicion of Northrup’s dangerousness, “Bright’s *hope* that Northrup ‘was not about to start shooting’ remains another word for the *trust* that Ohioans have placed in their State’s approach to gun licensure and gun possession.”<sup>136</sup> The court concluded, “[w]hile open-carry laws may put police officers (and some motorcyclists) in awkward situations from time to time, the Ohio legislature has decided its citizens may be entrusted with firearms on public streets.”<sup>137</sup>

*United States v. Ubiles*<sup>138</sup> is also noteworthy for its reference to local gun law. But like these other cases decided before *Robinson*, its focus is on the validity of the initial stop rather than the frisk. It also predates *Heller* and the modern Second Amendment cases. In *Ubiles*, an informant approached law enforcement officers during a festival on St. Thomas in the Virgin Islands.<sup>139</sup> The informant stated that a man in the crowd possessed a gun, though he did not state how he knew this nor did he offer any other facts that would have indicated that the man was behaving suspiciously or illegally.<sup>140</sup> One of the officers approached the man (*Ubiles*) but could not tell whether he was armed.<sup>141</sup> The officer—who later testified that he was “very concerned about the situation”<sup>142</sup>—frisked *Ubiles* and found a machete and a

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129. *Id.*

130. *Id.*

131. *Id.* at 1134.

132. *Id.* at 1132.

133. *Northrup*, 785 F.3d at 1132. *See also* OHIO REV. CODE ANN. §§ 9.68(C)(1), 2923.11 (West 2018).

134. *Northrup*, 785 F.3d at 1133.

135. *Id.* There are limits to this suggestion, though. It is one thing to make such a determination quickly and without substantial inquiries. But if the officer detained Northrup long enough, or through enough inquiry, that a reasonable person would no longer feel free to walk away or otherwise terminate the encounter, the encounter is no longer consensual and would require reasonable suspicion. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

136. *Northrup*, 785 F.3d at 1133.

137. *Id.* *Cf. Maraachli*, *supra* note 19, at 90 (disagreeing with *Northrup* and arguing for reasonableness of stop where a person walks on a public street carrying a gun).

138. 224 F.3d 213 (3rd Cir. 2000).

139. *Id.* at 215.

140. *Id.*

141. *Id.*

142. *Id.*

.22 caliber pistol, which allegedly had an obliterated serial number.<sup>143</sup> Ubiles was acquitted of the federal charge that he possessed a firearm with an obliterated serial number, but was convicted of the territorial charge of possessing an unlicensed firearm.<sup>144</sup>

The Third Circuit reversed, holding that the officer lacked reasonable suspicion.<sup>145</sup> Noting that local law permitted firearm possession “in a crowd or at a carnival,” the court said that a mere allegation of firearm possession does not suffice for a *Terry* stop and frisk.<sup>146</sup> “For all the officers knew, even assuming the reliability of the tip that Ubiles possessed a gun, Ubiles was another celebrant lawfully exercising his right under Virgin Islands law to possess a gun in public.”<sup>147</sup> The court analogized the case to an allegation that a man in the crowd possessed a wallet, the possession of which is legal.<sup>148</sup> Even if a subsequent search of the wallet revealed the illegal possession of counterfeit bills, there would be no justification for stopping and frisking the man simply on the allegation that he possessed a wallet.<sup>149</sup>

Finally, consider *United States v. Leo*.<sup>150</sup> A police officer in Racine, Wisconsin, spotted two young men in black hooded sweatshirts—Leo and Aranda—on a sidewalk before they ran into the yard of a duplex.<sup>151</sup> Thereafter, the police dispatcher announced a call from 911 about a possible burglary in the very duplex where the officer saw Leo and Aranda.<sup>152</sup> The caller described the burglars as “two Hispanic men wearing black hoodies, one of them with a gun, possibly a revolver[,]” and said that an unmarked police car had just passed.<sup>153</sup> The officer waited for backup and again saw Aranda and Leo walk toward a Head Start preschool, with Leo now wearing a red top and carrying a backpack.<sup>154</sup> The officer finally approached them as they continued toward the preschool entrance, stopped them, and—with the assistance of another officer, who detained Leo when he did not stop—both Aranda and Leo were handcuffed.<sup>155</sup>

The 911 caller, who lived in the upstairs unit of the duplex, identified both Leo and Aranda as the two men he had seen trying to enter the lower unit.<sup>156</sup> He was mistaken about the burglary, however, according to the police interview of the lower unit residents, who said they knew Aranda and Leo.<sup>157</sup> By then, however, it was too late for Leo. A search of his person did not yield any weapons, but—while he was handcuffed and while the backpack was out of the grabbing area—an immediate search of his backpack revealed a black hooded sweatshirt, a digital scale

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143. *Id.*

144. *Id.* at 216.

145. *Ubiles*, 224 F.3d at 217.

146. *Id.* at 218.

147. *Id.*

148. *Id.*

149. *Id.*

150. *United States v. Leo*, 792 F.3d 742 (7th Cir. 2015).

151. *Id.* at 744.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 744–45.

156. *Leo*, 792 F.3d at 745.

157. *Id.*



with marijuana residue, plastics bags, three bullets, and a loaded revolver.<sup>158</sup> The Government indicted him pursuant to the felon-in-possession statute.<sup>159</sup>

Leo conceded the validity of the stop, but challenged the search of the backpack.<sup>160</sup> The Seventh Circuit agreed that the search violated *Terry*, which was the sole basis on which the Government attempted to defend the search.<sup>161</sup> According to the court, although there are limited circumstances in which the police may extend a *Terry* frisk beyond the person of the suspect, this was not such a case.<sup>162</sup> At the time of the backpack search, “it was inconceivable that either Leo or Aranda would have been able to lunge for the bag, unzip it, and grab the gun inside.”<sup>163</sup> The officers’ suspicions may not have been fully dispelled by the initial stop and frisk of Leo’s person, but to enter the backpack, the officers needed probable cause.<sup>164</sup> The Government did not even attempt to justify the detention and backpack search on probable cause grounds.<sup>165</sup>

But the court went even farther in rejecting the Government’s contention that fears about Leo entering the Head Start school with a gun justified the backpack search. The court noted that the Head Start program was not a “school” under Wisconsin law, and thus carrying a gun there would not have violated the federal or state gun-free school zone laws.<sup>166</sup> Also, the concealed carry law in Wisconsin limits the rights of convicted felons or persons under age twenty-one, but the officers did not know Leo’s age or criminal history when they seized him, nor did they inquire.<sup>167</sup> The court finally noted the circuit precedent that permits public carry of a firearm pursuant to the Second Amendment.<sup>168</sup> Therefore, “considering these important developments in Second Amendment law together with Wisconsin’s gun laws,” the court was compelled to reject the Government’s justification for search without establishing probable cause.<sup>169</sup>

### C. Distinguishing Stops and Frisks

It is important to distinguish the cases involving the constitutionality of the frisk from cases involving the constitutionality of the stop at its inception, based simply on the claim of a weapon.

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158. *Id.*

159. *Id.*

160. *Id.* at 746.

161. *Id.* at 748.

162. *Leo*, 792 F.3d at 749–50.

163. *Id.* at 750.

164. *Id.* at 751. The court does not discuss it, but its ruling could have been justified pursuant to *United States v. Chadwick*, 433 U.S. 1 (1977). To the extent that *Chadwick* remains good law after the Supreme Court’s automobile exception cases, it would appear to hold that police may not search a closed container outside of a vehicle without a warrant, absent some other warrantless justification. *Id.* at 11–12. Here, the Government apparently could not rely on the *Terry*-property-frisk cases, nor on search incident to arrest doctrine, nor on exigency.

165. *Leo*, 792 F.3d at 748.

166. *Id.* at 752.

167. *Id.*

168. *Id.* (citing *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012)).

169. *Leo*, 792 F.3d at 752.

The Supreme Court held in *Florida v. J.L.* that an anonymous tip must bear “sufficient indicia of reliability” to justify a *Terry* stop,<sup>170</sup> and rejected a call from both Florida and the Federal Government to establish a firearms exception that would permit a stop and frisk anytime a tip describes the presence of a firearm.<sup>171</sup> *Black*, *Northrup*, and *Ubiles* are really cases about the constitutionality of the stop—the seizures of Black (and Troupe), Northrup, and Ubiles were unlawful, and thus their firearms were the fruit of that initial illegality.<sup>172</sup> Perhaps this explains why the *Robinson* majority cites none of them; in *Robinson*, there was reasonable suspicion for the stop.<sup>173</sup> Cases like *Black*, *Northrup*, and *Ubiles* are useful to the conversation because they rely explicitly on state gun law to establish limits on the scope of *Terry*.<sup>174</sup> Still, those cases ask whether mere gun possession is sufficient to establish the criminality predicate for an investigative stop.<sup>175</sup> Unlike *Robinson*, they do not ask whether, once the criminality predicate is established, the gun possession renders a suspect sufficiently dangerous to justify the frisk.<sup>176</sup>

*Leo* sits somewhere between those cases and a case like *Robinson*. As in *Robinson*, there was no serious question in *Leo* about the legality of the stop, or even about the lawfulness of patting down the exterior of Leo’s backpack.<sup>177</sup> And yet, the Seventh Circuit’s language about the scope of Second Amendment and Wisconsin gun law appears to be only dicta. After all, if police needed probable cause to search the backpack because the nature of the detention was such that it was now a *de facto* arrest, then even if the police had reasonable suspicion for the backpack it would not have mattered.<sup>178</sup> Of course, this gun rights language in *Leo* appears to suggest that if the fears of the police about Leo taking the gun into the Head Start

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170. 529 U.S. 266, 270 (2000) (quoting *Alabama v. White*, 496 U.S. 325, 332 (1990)).

171. *J.L.*, 529 U.S. at 271–72.

172. See *United States v. Black*, 707 F.3d 531 (4th Cir. 2013); *Northrup v. Toledo Police Dep’t*, 785 F.3d 1128 (6th Cir. 2015); *United States v. Ubiles*, 224 F.3d 213 (3rd Cir. 2000).

173. *United States v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017) (en banc). Indeed, *Robinson* emphasizes the distinction between a stop and a frisk. *Id.*

174. See *Black*, 707 F.3d 531; *Northrup*, 785 F.3d 1128; *Ubiles*, 224 F.3d 213; *Terry v. Ohio*, 392 U.S. 1 (1968).

175. See *Black*, 707 F.3d 531; *Northrup*, 785 F.3d 1128; *Ubiles*, 224 F.3d 213.

176. Cf. *United States v. Rodriguez*, 739 F.3d 481 (10th Cir. 2013). In *Rodriguez*, a New Mexico police officer responded to a tip that two Albuquerque convenience store employees were displaying handguns. *Id.* at 483. When the officer responded and saw Rodriguez’s gun tucked into his waistband, the officer asked Rodriguez to “step outside.” *Id.* at 484. He again saw the gun as Rodriguez moved past him, and the officer seized the gun. *Id.* Rodriguez, it turns out, was a felon in possession. *Id.* Because possession of a concealed handgun is lawful in New Mexico in some circumstances, Rodriguez argued, the police did not have sufficient justification for the stop. *Id.* The Tenth Circuit disagreed, upholding both the stop and the seizure of the gun. Because the officer could have reasonably concluded that the gun was loaded, the court said, and because guns are inherently dangerous, it follows that the officer could frisk Rodriguez for the weapon. *Rodriguez*, 739 F.3d at 491. The officer’s justification for the frisk would only have been lacking if an exception to the concealed carry prohibition was “readily apparent.” *Id.* at 490. For yet another variation, see *United States v. Orman*, 486 F.3d 1170 (9th Cir. 2007). There, the Ninth Circuit upheld a frisk based solely on the officer’s suspicion, and then knowledge, that the suspect was armed with a gun. *Id.* at 1176. In that case, however, the criminality predicate was not established; rather, the court found that the encounter was consensual. *Id.* at 1175–76. Upon the encounter, the officer had reasonable suspicion that Orman was armed, and this was sufficient for the frisk, despite the legality of concealed carry in Arizona. See *id.* at 1176.

177. See *United States v. Leo*, 792 F.3d 742 (7th Cir. 2015).

178. See *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

program were legitimate, this might have made some difference.<sup>179</sup> But it is hard to see why, if the remainder of the court's opinion is correct. *Michigan v. Long* would not have helped the Government because that case involved a car search in which the suspect could have gained immediate control of a weapon.<sup>180</sup> The same is true of *Cady v. Sheahan*, the Seventh Circuit precedent on which the Government relied where the suspect also posed an immediate threat based on his control of the container in that case.<sup>181</sup>

*Leo* therefore seems to stand for the proposition that a *Terry* frisk of a container is justified only when the container is situated such that the suspect could still gain immediate control of it and harm the officer. An armed suspect therefore cannot be "dangerous" within *Terry's* meaning if he has no control over the firearm.<sup>182</sup> This is different, though, than a claim that suspected possession of a firearm does not necessarily justify a frisk. After all, no one contested the fact that the police had enough reasonable suspicion to pat down *Leo's* person or the backpack, where the 911 caller had indicated the presence of a gun and the police did not know where the gun was located at the time of the initial stop.<sup>183</sup>

*Robinson*, therefore, is not as incompatible with the other lower court case law as it might at first appear to be. Synthesizing these cases requires, as *Robinson* does, appreciating the distinction between the justification for the initial stop and the justification for the frisk.<sup>184</sup> Clearly an officer cannot conduct a frisk if he cannot first conduct a lawful seizure of the person, or otherwise lawfully encounter the person.<sup>185</sup> This is true even if he knows that the object of his attention is armed, but lacks reasonable suspicion that the person has committed a crime or that criminal activity is afoot, and otherwise has no lawful basis for the encounter or for a search.<sup>186</sup> But in cases where there *is* reasonable suspicion for an initial stop based on the predicate of criminal activity—like *Robinson*—the question then is whether knowledge (or at least reasonable suspicion) that the suspect is armed is an objectively reasonable basis to conclude dangerousness for the frisk. Perhaps, as we assess the significance of an approach that is appropriately respectful of gun rights, it is helpful also to remember *Terry's* criminality predicate.

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179. See *Leo*, 792 F.3d at 751–52.

180. See 463 U.S. 1032 (1983).

181. 467 F.3d 1057 (7th Cir. 2006).

182. See *Leo*, 792 F.3d at 750.

183. See *id.* at 749.

184. See Gerald S. Reamey, *What's Fear Got To Do With It?: The "Armed and Dangerous" Requirement of Terry*, 100 MARQ. L. REV. 231, 261 (2016) (emphasizing that courts should distinguish suspicion for stops and frisks separately). Of course, one might still argue—contrary to cases like *Northrup* and *Black*—that the gun possession itself is sufficient for frisk, regardless of liberalized gun law. See Maraachli, *supra* note 19, at 93–96 (arguing that the treating firearm regulation as a closely regulated activity justifies a gun-based stop).

185. See *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (citing *Terry* and stating that "[w]hen the stop is justified by suspicion (reasonably grounded, but short of probable cause) that criminal activity is afoot . . . the police officer must be positioned to act instantly on reasonable suspicion that the persons temporarily detained are armed and dangerous.").

186. *Id.* See also *United States v. Orman*, 486 F.3d 1170, 1176 (9th Cir. 2007) (permitting frisk based on reasonable suspicion of a firearm, but where the encounter was deemed consensual).

## IV. THE CRIMINALITY PREDICATE AND THE SIGNIFICANCE OF REASONABLENESS

There is some juridical and political sense in the appeal to modern-day gun rights that is found in cases like *Leo*, *Black*, *Northrup*, and *Ubiles*, and in the *Robinson* dissent. If we are to avoid relegating gun rights to second-class status, as Justice Thomas warns, then perhaps a *Terry* frisk approach that explicitly acknowledges these rights would appear desirable. And yet, as the Supreme Court has said (and Justice Thomas joined in saying), Second Amendment rights are “not unlimited.”<sup>187</sup> Neither are state-created gun rights. And the Supreme Court has acknowledged that guns are dangerous.<sup>188</sup> There remains room, even in a legal culture that respects gun possession and the need for lawful self-defense, for judgments about who may and may not possess guns based on the threats gun possession can pose to good civil order and public safety. A categorical approach to the frisk, or even a modified, firearms-only categorical approach, might seem to better fit the realities of everyday life even in a liberalized gun culture, the kind of reality that law enforcement officers in the field must encounter daily. The question, then, is how to constitutionally assess dangerousness in the context of firearms possession. That is, how does an officer make a constitutionally acceptable *ex ante* determination of suspect dangerousness based on firearm possession, where *Terry*’s criminality predicate is already satisfied?

## A. Armed As Dangerous, Even If Trusted

*Heller* was limited to gun possession in the home.<sup>189</sup> It may well be that the Second Amendment protects a right to carry a firearm outside of the home, but one must find that right beyond *Heller*’s core holding (as some courts have done).<sup>190</sup> This does not fully answer the *Terry* frisk problem, however, because even if the Second Amendment does not extend to public carry (which is debatable), state law gun rights do. Also, one may argue—as several commentators have and as the Supreme Court has—that guns are inherently dangerous.<sup>191</sup> Even assuming this to be true, however, it also does not finally resolve the *Terry* frisk question if gun rights are relevant to the analysis. It may fairly be said of the Second Amendment’s framers, and of modern legislatures, that they chose to protect gun rights with full knowledge of the dangers that guns pose. Rather, the proper approach to assessing

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187. District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

188. See *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (stating, “[f]irearms are dangerous[.]”); *McLaughlin v. United States*, 476 U.S. 16, 17 (1986) (“[A] gun is an article that is typically and characteristically dangerous[.]”). See also *Wilkins*, *supra* note 19, at 1178 (discussing cases on dangers of firearms). Recall that *Rodriguez*’s holding as to the frisk is partially based on this premise. See *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013).

189. See *Heller*, 554 U.S. at 632, 635.

190. See, e.g., *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Grace v. District of Columbia*, 187 F. Supp. 3d 124 (D.D. Cir. 2016). For a discussion of the public carry cases, see GIFFORDS LAW CTR., POST-*HELLER* LITIGATION SUMMARY 8–9 (2017), <http://lawcenter.giffords.org/wp-content/uploads/2017/12/PHLS-December-17-Update-Final.pdf>.

191. See *Reamey*, *supra* note 184; *Wilkins*, *supra* note 19, at 1178; *Maraachli*, *supra* note 19, at 89 n.109.

*Terry*-style dangerousness in the context of liberalized gun rights may lie in a combination of gun-dangerousness, the realities of law enforcement, and the balance to be struck when making Fourth Amendment reasonableness determinations.

The view expressed by Judges Sutton and Harris reads the legislative trend as expressing the government's position that persons who carry in public are not dangerous because the liberalization of gun law reflects a legislative determination that citizens can be trusted with guns outside of the confines of the home. That is one sensible way of interpreting these legislative judgments. But there are limits to this reasoning.

To the extent that the right to public carry is a statutorily created one or that it falls within the ambit of Second Amendment protection, consider whether the message sent is precisely the opposite of the one that Judges Sutton and Harris advocate. Even if legal, even if *trusted*, the point of permitting public carry—open or concealed—is *to allow one to be dangerous* in the case of a confrontation. Indeed, open carry seems designed to send that very message openly—to affirmatively make known to others (potential opponents) that one *is* dangerous. Particularly if we accept the premise of *Heller*, that the core of the Second Amendment is to safeguard the privilege of self-defense in times of confrontation,<sup>192</sup> then it is sensible to believe that no person carries a gun outside of the home unless his intention is to use the gun in the case of confrontation. And in such situations, one presumably hopes to be a danger to anyone he or she must confront (hence the gun).<sup>193</sup> Although one may surely carry a firearm without the hope of ever using it—and perhaps most public carriers do not hope to use their weapon—one probably does not carry a weapon with the hopes of *not* being dangerous to a potential bad guy.

The independent inquiry approach, then, appears to be based on the premise of law-abiding citizens exercising their legally-proscribed gun possession rights, rather than assuming those citizens to be dangerous to law enforcement.<sup>194</sup> That, too, is sensible. But this approach overlooks a key factor: often, in the field, in the short time in which police encounters occur (and can go very badly), and with very limited information about a suspect,<sup>195</sup> law enforcement officers cannot know which gun possessors are the good guys and which are the bad guys. Their discretion must be exercised promptly; with every second, in dealing with an armed suspect, the potential danger to the officer increases.<sup>196</sup>

The language from, and underlying theory of, *Terry* is instructive. *Terry* was concerned with the police officer “taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and

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192. See *Heller*, 554 U.S. at 594–95.

193. See *Maraachli*, *supra* note 19, at 89 n.109 (“[G]uns are dangerous, that is the point of carrying them—to convey to others that you are dangerous, whether or not you intend to do something with the gun.”).

194. See, e.g., *United States v. Robinson*, 846 F.3d 694, 709–10 (4th Cir. 2017) (Harris, J., dissenting); *Northrup v. Toledo Police Dep’t*, 785 F.3d 1128, 1133 (6th Cir. 2015).

195. See *Saltzburg*, *supra* note 22, at 967 (discussing problems applying reasonable suspicion standard in situations where officers must often make quick decisions “on less information than they have relating to the stop.”).

196. See *Wilkins*, *supra* note 19, at 1184–86 (citing statistics on officers feloniously killed).

fatally be used against him.”<sup>197</sup> The *Terry* Court acknowledged that some of the most potent dangers to officers in the field are not the expected or predictable ones. Rather, it is the unexpected danger against which an officer must have the ability to guard.<sup>198</sup> And, the Court said, it would be unreasonable to force officers to take unnecessary risks.<sup>199</sup> It may, of course, be true that not every armed suspect poses an actual danger to the officer. Neither *Terry* nor *Williams* nor *Mimms* says otherwise. But the officer does not necessarily *know* which ones are and which ones are not. “[T]he issue[,]” the Court stated, “is whether a reasonably prudent man in the circumstances, would be warranted in the belief that his safety or that of others was in danger.”<sup>200</sup> The Court repeated this theme in *Mimms*<sup>201</sup> and has repeatedly acknowledged the officer safety rationale that justifies *Terry* frisks.<sup>202</sup>

The problem with the independent dangerousness/inquiry approach, then, is not simply that it misapprehends or understates the nature of dangerousness. It is that it dilutes the text of the Fourth Amendment, obscuring a reasonableness inquiry with an inquiry that uses the balancing of gun rights with search and seizure rights to focus on the *likelihood* of dangerousness. But the text of the Fourth Amendment requires only that the search be reasonable. It may be true that a particular armed suspect is not actually dangerous to the officer. But that is not the relevant question. The question is whether it is *reasonable* for the officer to believe that an armed suspect who has been stopped in connection with a crime is dangerous, even if the officer later turns out to be wrong.<sup>203</sup> This kind of reasonableness inquiry has often informed not just the *Terry* cases but the Court’s other Fourth Amendment jurisprudence that vindicates law enforcement interests.<sup>204</sup>

#### B. The Pure Second Amendment Cases

The focus on gun possession rights, and the presumption of the trusted gun-possessor, also obscures the reality of *unlawful* gun possession in America. General legal protection for gun possession does not necessarily negate other specific gun controls that target persons based on their propensity to pose dangers when armed. “[P]laced in the wrong hands,” the Fourth Circuit (Judge Neimeyer, no less) has said, “firearms present a grave threat to public safety, and for this reason, the Anglo-American right to bear arms has always recognized and accommodated limitations for persons perceived to be dangerous.”<sup>205</sup> Consequently, under federal law

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197. *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

198. *Id.* at 24; *see also* *United States v. Rodriguez*, 739 F.3d 481, 491 (10th Cir. 2013) (“We will not deny an officer making a lawful investigatory stop the ability to protect himself from an armed suspect whose propensities are unknown.”).

199. *Terry*, 392 U.S. at 27.

200. *Id.*

201. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

202. *See, e.g., Florida v. J.L.*, 529 U.S. 266, 272 (2000). *See also supra* Part II and accompanying notes.

203. *See Rodriguez*, 739 F.3d at 485–86; *cf. United States v. Cortez*, 449 U.S. 411, 418 (1981) (explaining that law enforcement justifications often are based on less than certainties).

204. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295 (1999); *Alabama v. White*, 496 U.S. 325 (1990); *Illinois v. Gates*, 462 U.S. 213 (1983).

205. *United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012).

alone, for example, numerous restrictions exist on gun possession: felons,<sup>206</sup> those who have been adjudicated as a mental defective or who have ever been committed to a mental institution,<sup>207</sup> unlawful drug users or addicts,<sup>208</sup> persons who have been dishonorably discharged from the armed forces,<sup>209</sup> illegal aliens,<sup>210</sup> and others.<sup>211</sup> It is a crime to knowingly receive a firearm with an obliterated or altered serial number.<sup>212</sup> It is a crime to possess a machine gun.<sup>213</sup> It is a crime for a minor to possess a firearm, except under limited conditions.<sup>214</sup> Violent crimes, or drug trafficking crimes, committed with a firearm are subject to enhanced punishments.<sup>215</sup> And similar restrictions on possession and use of guns exist in state law.<sup>216</sup>

Of course, entire bodies of criminal law and of psychiatric and criminological literature have developed around predictions of dangerousness.<sup>217</sup> But this material is generally focused on dangerousness as a sentencing and corrections matter. Texas, for example, only permits imposition of capital punishment upon defendants whose future dangerousness has been established beyond a reasonable doubt.<sup>218</sup> Dangerousness has also become a central feature of non-capital sentencing and pre-trial detention.<sup>219</sup> But officers in the field cannot be expected to consult the latest social science research when performing investigative stops. They must make informed, but ready, judgments on imperfect information, certainly less readily available than that available to a sentencing judge or a legislator. *Terry*, after all, feared “present” dangers, not hypothetical future ones.<sup>220</sup> The aforementioned gun restrictions offer some guidance for making *ex ante* determinations of dangerousness with respect to armed persons. But in light of *Heller*, a substantial body of case law has developed around these restrictions. That case law, too, seems to be trending toward considerations of dangerousness in weighing the validity of at least some restrictions under the Second Amendment.

*Heller* itself speaks of danger. *Heller* refers to the core of the Second Amendment as reserved for “law-abiding, responsible citizens” (as opposed to those who

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206. See 18 U.S.C. § 922(g)(1) (2012). While the statute is often referred to as the “felon” in possession statute, it can apply to misdemeanors punishable by more than one year in prison. *Id.*

207. See *id.* § 922(g)(4).

208. See *id.* § 922(g)(3).

209. See *id.* § 922(g)(6).

210. See *id.* § 922(g)(5)(A).

211. See *id.* § 922(g)(2) (fugitives); § 922(g)(7) (American citizens who have renounced American citizenship); § 922(g)(8) (persons subject to certain court orders); § 922(g)(9) (prior conviction for misdemeanor crimes of domestic violence).

212. See *id.* § 922(k).

213. See *id.* § 922(o).

214. See *id.* § 922(x).

215. See *id.* § 924(c).

216. For a summary of relevant state laws, see *Categories of Prohibited People: Summary of State Law*, GIFFORDS L. CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/categories-of-prohibited-people/#state> (last visited Apr. 18, 2018).

217. See, e.g., Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497 (2012); Robert T.M. Phillips, *Predicting the Risk of Future Dangerousness*, 14 AMA J. ETHICS 472 (2012); Franklin E. Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481 (1986).

218. See TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (West 2018).

219. See generally Baradaran & McIntyre, *supra* note 217.

220. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

are not law-abiding and responsible).<sup>221</sup> This suggests that those who fall into the latter category are left unprotected because their possession of a firearm makes them a threat to civil society. *Heller* also speaks of “dangerous and unusual weapons[,]” that are left unprotected by the Second Amendment.<sup>222</sup> Finally, *Heller* speaks of “longstanding prohibitions” on “felons and the mentally ill.”<sup>223</sup> This language from *Heller* has been the subject of numerous challenges to gun possession restrictions.<sup>224</sup> Although *Heller* did not establish a framework for evaluating the constitutionality of such a gun restriction, lower courts have typically employed a framework that determines whether the restriction implicates the core of the Second Amendment—the right of a law-abiding, responsible person to possess a gun in the home for defense—and then applies an appropriate means-ends review (typically, intermediate scrutiny or strict scrutiny), depending upon whether the asserted right fits historically within the Second Amendment’s core.<sup>225</sup>

*Heller* did not explicitly make dangerousness the standard against which to measure the constitutionality of a possession restriction. But some lower courts have appeared to use dangerousness as a guiding factor in determining whether the Second Amendment forbids application of the ban.

In *Binderup v. Attorney General*, a (wildly) divided Third Circuit considered the federal felon-in-possession ban (section 922(g)(1)) as applied to two men with misdemeanor state convictions punishable by two or more years in state prison.<sup>226</sup> The court held that their offenses were insufficiently serious and thus the Government had to satisfy heightened judicial scrutiny.<sup>227</sup> It could not, because the Government could not demonstrate that banning firearms for those who fit this category of challenger—someone with a decades-old misdemeanor conviction—would promote public safety or responsible gun ownership.<sup>228</sup> The second step of the court’s as-applied analysis therefore reflected at least an implicit judgment about the threat (or here, absence thereof) that these litigants would pose if armed.<sup>229</sup> That threat was judged against such factors as the nature of the offense of conviction, the staleness of the conviction, and law-abidingness since the conviction.<sup>230</sup>

The Sixth Circuit conducted a similar kind of analysis with respect to section 922(g)(4), which prevents firearm possession by someone who has been adjudicated as a mental defective or committed to a mental institution.<sup>231</sup> In *Tyler v. Hillsdale County Sheriff’s Department*, the court considered the case of a man who, after a divorce, spent a month in a mental hospital.<sup>232</sup> That incident occurred thirty years

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221. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

222. *Id.* at 627.

223. *Id.* at 626.

224. *See Post-Heller Litigation Summary*, *supra* note 190, at 4.

225. *See, e.g., United States v. Marzzarella*, 614 F.3d 85, 95 (3rd Cir. 2010); *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012).

226. *Binderup v. Att’y Gen.*, 836 F.3d 336 (3d Cir. 2016).

227. *Id.* at 353.

228. *Id.* at 353–56.

229. *See id.*

230. *Id.*

231. *See* 18 U.S.C. § 922(g)(4) (2012).

232. 837 F.3d 678, 681 (6th Cir. 2016).



ago.<sup>233</sup> In the years since, he held a steady job, remarried, received counseling, had not again experienced a depressive episode, and was diagnosed as not being mentally ill.<sup>234</sup> The court recognized that Congress had the power to “categorically prohibit certain presumptively dangerous people from gun ownership[,]”<sup>235</sup> and that courts should not impose “too high a burden on the government to justify its gun safety regulations, particularly where Congress has chosen to rely on prior judicial determinations that individuals pose a risk of danger to themselves or others.”<sup>236</sup> Concluding that not all persons captured by section 922(g)(4) are unprotected by the Second Amendment, applying strict scrutiny, and finding that the government possessed an important interest in enforcing section 922, the court nonetheless could not ascertain the appropriate fit. The court believed that the government had still not justified the 922(g)(4) ban either on its face or as applied to Tyler by showing that he “would be a risk to himself or others if he were allowed to possess a firearm.”<sup>237</sup>

In some cases, however, considerations of danger will lead a court to uphold a ban on possession. In *United States v. Carter*, for example, the Fourth Circuit considered the constitutionality of the federal restriction on possession by unlawful drug users (section 922(g)(3)), where the defendant possessed marijuana at the time he was found with a firearm in his apartment.<sup>238</sup> In considering his challenge to the constitutionality of the statute, the court said that the government had an important interest in “keeping guns out of the hands of dangerous persons[.]”<sup>239</sup> Although the court remanded for consideration of the “fit” prong of its standard of review, with respect to whether “drug users and addicts possessing firearms are sufficiently dangerous to require disarming them[,]”<sup>240</sup> the court noted that “[t]his burden should not be difficult to satisfy in this case” in light of the dangers of “mixing drugs and guns.”<sup>241</sup> As the Fourth Circuit also explained, the Seventh Circuit in *United States v. Yancey* had identified a close connection between drug use and violent crime.<sup>242</sup>

Federal courts have been especially reliant upon the dangerousness rhetoric in the context of the domestic violence misdemeanor ban.<sup>243</sup> Most recently, in *Stimmel v. Sessions*, the Sixth Circuit upheld section 922(g)(9), citing the Supreme Court’s recognition that the ban filled a “dangerous loophole” in the felon-in-possession law,<sup>244</sup> as well as its own recognition in *Tyler* that placing his conduct “squarely within” the core of the Second Amendment would undermine congressional authority to “categorically prohibit certain presumptively dangerous people

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233. *Id.*

234. *Id.* at 683–84.

235. *Id.* at 691.

236. *Id.*

237. *Id.* at 699.

238. *See United States v. Carter*, 669 F.3d 411, 412 (4th Cir. 2012).

239. *Id.* at 417.

240. *Id.* at 419.

241. *Id.* at 420.

242. *Id.* (citing *United States v. Yancey*, 621 F.3d 681, 686 (7th Cir. 2010)).

243. *See* 18 U.S.C. § 922(g)(9) (2012).

244. *Stimmel v. Sessions*, 879 F.3d 198, 202 (6th Cir. 2018) (quoting *United States v. Hayes*, 555 U.S. 415, 426 (2009)).

from gun ownership.’”<sup>245</sup> Even though Stimmel’s lone misdemeanor domestic violence conviction was stale (from 1997),<sup>246</sup> the court was persuaded by the government’s asserted proof that those convicted of domestic violence represent a future danger.<sup>247</sup> Consequently, it held that there was a reasonable fit between section 922(g)(9) and the government’s interest in keeping firearms from dangerous people.<sup>248</sup> Other circuits have followed this reasoning in upholding section 922(g)(9).<sup>249</sup>

Even this admittedly cursory review of the Second Amendment cases demonstrates why it is therefore important not to overstate Second Amendment rights or the accompanying case law. While a few recent cases have certainly helped give constitutional gun rights greater teeth, a significant body of federal case law has continued to uphold gun restrictions against Second Amendment challenges.<sup>250</sup> Still, as these recent cases show, the federal judiciary’s approach to as-applied gun possession restrictions has tended to emphasize dangerousness in weighing the government’s interests and those of the individual. The question is whether Second Amendment dangerousness can (or should) inform *Terry*-style dangerousness.

### C. Weighing Reasonableness and *Terry*’s Criminality Predicate

As it turns out, then, state legislative judgments may be a poor proxy for dangerousness. Although liberalization may reflect a general judgment that possessing a gun does not necessarily make one dangerous, those laws—no matter how liberal—must account for other state laws, superseding federal laws, and Second Amendment jurisprudence that all provide for bases to restrict gun possession by some among the citizenry. At the same time, the Second Amendment cases reflecting an emerging jurisprudence of dangerousness in evaluating as-applied challenges to gun possession restriction suggest that dangerousness is ordinarily judged against a variety of situational factors. And yet these pure Second Amendment cases tend to involve judgments made on the basis of facts that do not involve law enforcement judgments in the field and in the heat of a criminal investigation. The pure Second Amendment cases, then, may also be inadequate for assessing dangerousness in the specific context of *Terry* stops.

Still, what we know unequivocally from the Second Amendment cases is that the core of the right to keep and bear arms offers protection for law-abiding, responsible citizens.<sup>251</sup> But remember: the initial *Terry* stop is impermissible unless the officer has reasonable suspicion that the suspect has committed a crime or that

245. *Id.* at 207 (quoting *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 691 (6th Cir. 2016)).

246. According to the court, Stimmel was convicted under Ohio law of misdemeanor first-degree domestic violence after he threw his wife against a wall, knocked her to the floor, and tried to remove her rings. *Id.* at 201. She sustained a cut to her head. *Id.*

247. *Id.* at 209–12.

248. *See id.* at 212.

249. *See, e.g., United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013); *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010).

250. *See Post-Heller Litigation Summary, supra* note 190, at 2 (“Altogether, in the more than 1,230 state and federal court tracked by Giffords Law Center since *Heller*, courts have rejected the Second Amendment challenges 93% of the time.”).

251. *See District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

criminal activity is afoot.<sup>252</sup> That criminality predicate undermines, or at least diminishes, any Second Amendment claim that the suspect may otherwise have. As far as the Fourth Amendment is concerned—its text, after all, requires only reasonableness—the suspect is no longer to be regarded as innocent, law-abiding and responsible. The construct of the virtuous citizen who poses no threat to the community has now collapsed—or at least been substantially diminished—in light of the officer’s reasonable suspicion for the seizure. Even if the officer turns out to be wrong, and the suspect has neither committed a crime nor engaged in any criminality and is possessing the gun lawfully, *Terry* gives the advantage to the officer until his initial suspicion is dispelled.<sup>253</sup> And while it is true that one may engage in unlawful conduct and yet still pose no danger to an officer—even if armed—neither the Second Amendment nor *Terry* would appear to tip the balance in the suspect’s favor under the circumstances. As stated above, the underlying focus of *Terry* and its progeny is the protection of the officer.<sup>254</sup>

State law gun rights pose a slightly different problem. But even in liberal gun rights jurisdictions, gun possession remains premised upon law-abidingness and responsible citizenship, with restrictions imposed either by state law or by superseding federal law.<sup>255</sup> The criminality predicate for the *Terry* stop, therefore, counterbalances the argument from state gun law as well.

Gun rights law, then, can still receive meaningful protection under *Terry* doctrine, but most of its work is performed at the initial stage of the encounter. The liberalization of gun rights can function as a limit on the scope of the initial stop, as in cases like *Northrup* or *Black*. But once a legally sufficient justification has been established for the stop—reasonable suspicion that the suspect has committed a crime or that criminal activity is afoot—the fact that the jurisdiction liberally permits gun possession and public carry has less force. The liberalization of gun law, whether via the Second Amendment, state legislation, or state constitutional law, relates to *Terry*’s criminality predicate because the law enforcement justification for the stop is drawn from an objective indicator—whether something is legal or illegal, which is (or ought to be) knowable to the investigating officer.<sup>256</sup> Of course, the officer need only be *reasonably suspicious* of criminality, not certain. But still,

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252. See *Terry v. Ohio*, 392 U.S. 1, 22, 30 (1968).

253. This criminality predicate is admittedly more complicated, and weaker, when one is merely a passenger in an automobile that has been subjected to a traffic stop. Using *Terry* principles, the Supreme Court has said that all passengers can be removed from the automobile—and all are seized, see *Brendlin v. California*, 551 U.S. 249 (2007)—even if the officer has no reasonable suspicion that the passengers have engaged in unlawful conduct. See *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). Therefore, one may actually be subjected to a *Terry*-style seizure without any particularized suspicion of wrongdoing. Still, the Court has acknowledged the special dangers to police officers during traffic stops. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); *Johnson*, 555 U.S. at 331. In this unique situation, though the criminality predicate is a weaker basis for allowing the frisk of a passenger suspected to be armed, the officer safety rationale remains strong.

254. See *supra* Part II and accompanying notes. But see Reamey, *supra* note 184, at 235 (arguing that whether a suspect is armed and dangerous is a different inquiry than whether the officers fears for his safety).

255. See GIFFORDS L. CTR., *supra* note 216.

256. As to whether the government could justify the stop where the officer was reasonably mistaken as to whether the gun possession was unlawful, see *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

his judgment about whether to conduct the stop will be made based on his understanding of what the law objectively requires or permits. The decision whether to frisk—and the dangerousness determination that accompanies it—is different. It requires reasoned judgments based on factors that may arise during the stop or that are based on the officer's experience, judgments that often must be made "even quicker" and "on less information" than is available with respect to the stop.<sup>257</sup>

Permitting this broader scope for *Terry* frisks where there is reasonable suspicion for the stop, as well as that the suspect is armed, has the virtue not only of being consistent with Second Amendment doctrine but also of providing law enforcement with adequate tools to enforce the gun restrictions at work in every jurisdiction.

Of course, if one's goal is to accommodate statutory and constitutional gun rights and yet still leave flexibility for law enforcement officers, and if allowing gun rights to function as a limit on the initial stop remains unsatisfying, then one way of synthesizing the state laws, the *Terry* cases, and the pure Second Amendment cases would be to judicially adopt a prophylactic rule that requires a reasonable inquiry before conducting the frisk. This was, after all, part of *Terry*'s original formulation,<sup>258</sup> and ostensibly would function consistently with the independent dangerousness approach from the *Robinson* dissent. Such a prophylactic might look like this: where an officer has conducted a valid *Terry* stop, but before he conducts a frisk based on his suspicion that a suspect is merely armed with a gun, the officer must specifically confirm whether the suspect is armed. If so, then the officer must determine whether the person has a legal right to his firearm possession at the time. And if so, there would be a presumption against conducting a frisk, unless additional facts develop that cast doubt on the suspect's claim or otherwise independently create reasonable suspicion of dangerousness.

There are reasons to be cautious about such a rule. Though it is consistent with some wording in *Terry*, it is inconsistent with much of Justice Harlan's *Terry* concurrence,<sup>259</sup> and with the Court's holding in *Williams* (which appeared to adopt Justice Harlan's position).<sup>260</sup> A reasonable inquiry requirement would also potentially increase the risk to officers, which Chief Justice Warren's opinion in *Terry* took pains to avoid.<sup>261</sup> If a suspect is armed, but cannot be disarmed until the officer has conducted a reasonable inquiry into the legality of the suspect's gun possession, this effectively puts the officer in a position of subservience to the unknown. That is a dangerous position in which to leave an officer who has already developed legally sufficient cause to believe that the suspect is engaged in unlawful conduct.<sup>262</sup>

Reasonable inquiry, then, may represent a sensible approach for officers in the field conducting *Terry* frisks if the goal is to give primacy to, and show adequate

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257. Saltzburg, *supra* note 22, at 967.

258. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

259. See *id.* at 31–33 (Harlan, J., concurring).

260. See *Adams v. Williams*, 407 U.S. 143, 146 (1972).

261. See *Terry*, 392 U.S. at 24, 27–30.

262. See *United States v. Rodriguez*, 739 F.3d 491 (10th Cir. 2013). See also *Wilkins*, *supra* note 19, at 1187 (arguing that the combination of an armed suspect and unknown dangers puts law enforcement officers at great risk).

respect for, federal and state gun rights. Legislatures or individual police departments may consider adopting this approach.<sup>263</sup> But making it a *constitutional* requirement is a very different matter.

Perhaps, then, the source of this dilemma is not really the conflict of two constitutional provisions at all. Rather, perhaps it is with *Terry's* standard. *Terry* acknowledges the difficult circumstances of everyday policing, as well as the split-second judgments that officers must often make.<sup>264</sup> And yet, the “armed and presently dangerous” formulation—particularly if read in conjunction with the independent dangerousness approach—requires police officers to make judgments about dangerousness based often on very little objective information. If dedicated research in criminology has difficulty assessing dangerousness,<sup>265</sup> imagine the difficulty of making such an assessment quickly and based (often) only on suspicion about possible criminality—perhaps serious but perhaps only petty. Officers may have objective information about an armed suspect’s intentions, but usually that knowledge, too, will be imperfect. Requiring an *ex ante* determination of dangerousness based on limited information thus seems like an intolerable burden to place on law enforcement.

And yet, that burden becomes more tolerable if we understand that neither *Terry* nor its progeny require a showing of *actual* dangerousness. Rather, they simply ask whether a reasonable officer would be justified in determining that a particular armed suspect poses a threat to the officer or others. In a legal and political culture that respects the right to defend oneself or another with a firearm, it is easy to see why anything less than an independent dangerousness/inquiry rationale would be unsatisfying. But gun rights, like Fourth Amendment rights, are not without limits. As the Court has (unanimously) said:

Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern.<sup>266</sup>

## V. CONCLUSION

It is the proud assertion of many gun rights advocates that guns should be widely permitted for the law-abiding, responsible citizen, while keeping guns out of the hands of dangerous people. Americans experience both sides of that formula. The Second Amendment is now understood to protect individual rights to keep and bear firearms—and, happily for Justice Thomas, there appears to be increasing judicial recognition of constitutional gun rights—and liberal gun laws exist throughout much of the country. And yet, legislation to regulate gun possession is also perva-

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263. Compare legislation of this kind with legislation that requires individuals to show law enforcement that they are permitted to carry. See *Maraachli*, *supra* note 19, at 96–97.

264. *Terry*, 392 U.S. at 23–24.

265. See *supra* Section IV.B and accompanying notes.

266. *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (citing *Terry*, 392 U.S. at 30).

sive (and could sensibly be stronger nationwide). One can proclaim that the constitutional law of criminal procedure should account for liberalization of gun possession, while still acknowledging the realities of the dangers that law enforcement officers face from armed suspects. Reading *Terry* to preclude stops based simply on the fact of gun possession while permitting frisks of suspects who are armed or reasonably suspected as being armed, and who have otherwise been legitimately seized, responds to each of these concerns. *Terry*, then, can co-exist—even if somewhat uncomfortably—within a regime of liberalized gun rights, without compromising *Terry*'s core concern for the protection of law enforcement.